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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>QUINN MALCOLM WILRIDGE,<br><br>Defendant and Appellant. | H024137<br>(Santa Clara County<br>Super. Ct. No. BB153223) |

## STATEMENT OF THE CASE

An information charged the defendant, Quinn Malcolm Wilridge, with robbery (Pen. Code, § 211-215.5, subd. (c)),[1] and alleged he suffered six prior "strikes" (§§ 667, subd. (b)-(i), 1170.12) and one prior serious felony conviction (§ 667, subd. (a)). These prior crime allegations all arose from robbery convictions in Washington state. The trial court ruled in limine that the Washington state robberies potentially constituted strikes and a serious felony conviction. A jury found the defendant guilty of robbery and found true the prior strike allegations. The court found that the defendant was the person who suffered the Washington strikes and serious felony conviction and sentenced the defendant to a five-year determinate term plus 25 years to life in prison.

[1] All further statutory references shall be to the Penal Code unless specified otherwise.

## STATEMENT OF FACTS

Ramzi Sabanikh[2] was working at the Pizza Hut restaurant in Palo Alto on the afternoon of May 2, 2000. The defendant, wearing a silver shirt, entered the restaurant and bought a $1.50 soda from Mr. Sabanikh. As Mr. Sabanikh opened the cash register he noticed that the defendant looked at the money in the drawer. The defendant asked Mr. Sabanikh if he was working alone. Mr. Sabanikh said that he was alone because the driver was out delivering orders. He also casually mentioned to the defendant that he had been robbed approximately a month prior to the defendant's visit and showed the defendant a newspaper account of the robbery. The defendant asked Mr. Sabanikh if there was a beach nearby, then shortly thereafter left the restaurant. Mr. Sabanikh was not afraid of the defendant during this first visit.

The defendant walked into a Footlocker store near the Pizza Hut about 3:26 p.m. Jennifer Gippetti, who works at that store, noticed in the defendant's hand a light colored baseball hat with an Oakland A's or "L.A." logo.[3] When Ms. Gippetti looked again towards the defendant she noticed that he no longer had the hat in his hand. Rather, he had a suspicious bulge under his zipped-up vest,[4] which had previously been unzipped. She asked the defendant where he had put the hat. He replied "[o]ver there," gesturing, and quickly left the store, heading in the direction of the Pizza Hut. The hat was nowhere to be found in the area towards which the defendant had gestured.

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[2] Mr. Sabanikh's testimony reflects that his English language skills are somewhat limited. Defense counsel asked him to let counsel know if he did not understand any of the questions during cross-examination.

[3] Ms. Gippetti testified that Exhibit 1 is the same type of hat that is sold at this Footlocker store and that the defendant had in his hand.

[4] Ms. Gippetti and Mr. Sabanikh identified Exhibit 4 as the vest worn by the defendant.

The defendant returned to the Pizza Hut a few minutes after his first visit. He was wearing sunglasses and a hat marked with the letters "L.A."[5] pulled down covering part of his face, but Mr. Sabanikh nonetheless recognized him as the same man who had just been there. The defendant ordered another soda, and Mr. Sabanikh told him that the price was $1.50. The defendant gave Mr. Sabanikh one dollar and said "Open the cash." Not wanting to open the register, Mr. Sabanikh responded that the cost was $1.50. The defendant gave Mr. Sabanikh 50 cents and again said "[o]pen the cash."

Mr. Sabanikh then noticed that the defendant had one hand tucked beneath the hem of his shirt near his waistband. The defendant said "Okay, come on, come on, open the cash." "I'm not going to shoot you." "Give me all the money." The defendant told Mr. Sabanikh to put the money in a bag, which he did. Mr. Sabanikh did not want to give the defendant the money, but did so because he was scared that the defendant might shoot him. The defendant took the money and told Mr. Sabanikh to go to the back of the restaurant, which he did. After he heard the defendant leave the restaurant, Mr. Sabanikh pressed a panic alarm button and called 911 to report the robbery. Mr. Sabanikh told the 911 operator that the robber did not have a gun.[6]

Police officer Madrigal arrived at the Pizza Hut within a few minutes of Mr. Sabanikh's call. Officer Madrigal interviewed Mr. Sabanikh about the robbery. He tried to tell the officer everything that he could remember, but was scared and may have left out some details. Officer Madrigal testified that Mr. Sabanikh, who appeared shaken and nervous, did recount that the defendant told him to open the cash register, "I need the money" and "put the money in the bag," but did not mention him saying "I don't want to

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[5] Mr. Sabahnikh testified that Exhibit 1 looked like the hat the defendant wore.

[6] A recording of Mr. Sabanikh's conversation with the 911 operator was played for the jury.

. . . shoot you," "[g]ive me all the money" or putting his hand under his shirt hem. He told Officer Madrigal that he feared he would be hurt if he did not comply with the defendant's orders. The interview was interrupted, however, when Officer Madrigal took Mr. Sabanikh to another location to show him a suspect who had been detained by police.

Police officer Jason Peardon responded to the dispatch regarding the Pizza Hut robbery. He detained the defendant, who matched the robber's description, at a location approximately three blocks from the Pizza Hut within about five minutes of Mr. Sabanikh's 911 call.[7] Mr. Sabanikh identified this detainee, the defendant, as the man who had just robbed him. The defendant had two one-dollar bills in one pocket and $91 in small bills rolled up in the other pocket. He was wearing a silver or gray shirt, green vest, sunglasses and a baseball hat on his head.

## DISCUSSION

### I. *The Court's Refusal to Give the Defendant's Proposed Instruction Regarding the Reasonableness of the Victim's Fear Was Not Error*

A defendant has a right to an instruction that pinpoints the theory of the defense. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Wright* (1988) 45 Cal.3d 1126, 1137.) The court is under no duty, however, to give repetitive instructions (*People v. Gatlin* (1989) 209 Cal.App.3d 31, 44) and may refuse instructions " 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Hines* (1997) 15 Cal.4th 997, 1067-1068; *People v. Wright*, *supra*, 45 Cal.3d at p. 1137; *People v. Hughes* (2002) 27 Cal.4th 287, 361.) Even where a requested pinpoint instruction is an accurate expression of the law, the court's refusal to issue such an instruction is examined for a determination whether it was reasonably probable the jury would have come to a more favorable result had the

[7] Police records reflected that a call alleging that a hat had been stolen from the nearby Foot Locker approximately six minutes before Mr. Sabanikh's 911 call.

instruction been issued. (*People v. Earp* (1999) 20 Cal.4th 826, 887; *People v. Hughes*, *supra*, 27 Cal.4th at p. 362-863.)

A trial court's refusal to issue a jury instruction requested in an untimely fashion is reviewed for abuse of discretion. (*People v. Stearns* (1971) 14 Cal.App.3d 178, 185; *People v Smith* (1968) 265 Cal.App.2d 775, 779.) Where the instructions read to the jury were not misleading or inaccurate, the court's refusal to grant a tardy request for instruction is not error. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1180-1181; see also *People v. Simon* (2001) 25 Cal.4th 1082, 1109-1110.) In this case, the instructions that were given adequately informed the jury of the governing law and did not unfairly preclude the jury from considering defendant's defense theory. (Cf. *People v. Catlin* (2001) 26 Cal.4th 81, 151-152.)

The defendant claims the trial court erred by refusing to give to the jury a custom-made pinpoint instruction that the fear element of robbery must be objectively reasonable. The fact that this instruction was only requested immediately prior to jury instruction and, as appellate counsel admits, the instruction was incomplete on the issue it proposed to address lead us to conclude that the court's refusal to give the instruction did not constitute error. Further, a correct statement of the law on the issue to be addressed by the defendant's instruction would have weighed in favor of a finding of guilt, negating any potential prejudice from the absence of such an instruction.

The defense theory of the case was that the defendant was guilty of theft rather than robbery because he did not do anything that was intended to or would have caused fear in a reasonable victim. When the defendant asked for the money he merely wanted to get his change for the soda he had purchased. The victim offered up the contents of the cash register to the defendant because he unreasonably feared, because of his prior experience as a robbery victim, that the defendant was going to rob him. Mr. Sabanikh's original statements to the 911 operator and to Officer Madrigal, which did not include mention of shooting or the possible presence of a gun, were more reliable evidence of the

actual events than his trial testimony. Counsel argued that the victim's trial testimony was exaggerated to justify giving away his employer's cash.

On October 15, 2001, after the presentation of evidence was complete, the court held proceedings to advise the parties of its intended instructions and to hear argument by the parties regarding any objections or additions to those instructions. Defense counsel objected to the content of several of the instructions proposed by the court. When asked by the court if the parties had any further concerns, defense counsel did not offer any additional instructions. The next day was scheduled to include instruction of the jury and closing arguments.

On October 16, 2001, defense counsel requested the following instruction regarding the fear element of robbery: "Where fear is relied upon, it must be established by proof of conduct, words, or circumstances reasonably calculated to produce fear[,]" roughly quoting[8] *People v. Borra* (1932) 123 Cal.App. 482, 484. The court observed that the proposed instruction was untimely. The court further observed that the instruction omitted the next sentence, which it believed was an important explanation of the principle set forth by the *Borra* opinion.[9] The prosecution objected to this instruction on the grounds that this subject was already addressed by instructions selected by the court, and that he had not had the opportunity to review the authority cited by defense counsel or the propriety of the modifications made by defense counsel. Finding that the instructions

[8] Defense counsel substituted "fear" for the term "intimidation" used in the original based upon separate, uncited authority.

[9] The explanation noted by the court states "But it is not necessary there be proof of actual fear, as fear may be presumed where there is just cause for it." (*People v. Borra*, supra, 123 Cal.App. at p. 484.)

already agreed upon[10] adequately addressed the issues presented, the court denied defense counsel's request to issue the proposed instruction to the jury.

In order to protect the defendant's right to jury findings beyond a reasonable doubt on all elements of a charged crime, the trial court has a sua sponte duty to correctly instruct the jury regarding the elements of such crimes. (*Estelle v. McGuire* (1991) 502 U.S. 62, 69; *People v. Guiuan* (1998) 18 Cal.4th 558, 569; *People v. Prettyman* (1996) 14 Cal.4th 248, 270.) A defendant's claim on appeal that such instruction was too general or did not completely address the matters at hand is barred if he failed to properly request at trial an instruction to pinpoint or clarify the issues to be considered by the jury. (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1711; *People v. Sully* (1991) 53 Cal.3d 1195, 1218.)

"In any criminal case which is being tried before the court with a jury, all requests for instructions on points of law must be made to the court and all proposed instructions must be delivered to the court before commencement of argument. Before the commencement of the argument, the court, on request of counsel, must: (1) decide whether to give, refuse, or modify the proposed instructions; (2) decide which instructions shall be given in addition to those proposed, if any; and (3) advise counsel of

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[10] The instructions to the jury included the following: "Every person who takes personal property in the possession of another against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive that person of the property, is guilty of the crime of robbery . . . ." "Every person who steals, takes, carries, leads or drives away the personal property of another with the specific intent to deprive the owner permanently of his property, is guilty of the crime of theft by larceny." "In the crime[s] [of] . . . robbery and petty theft . . . there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless the specific intent exists, the crime to which it relates is not committed." "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of a lesser crime. [¶] The crime of petty theft is a lesser to that of robbery in Count 1."

all instructions to be given." (§ 1093.5.) Advance notice of proposed instructions is required so that the parties and trial court have an orderly process affording reasonable opportunity to research and consider the propriety of such instructions. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1180-1181.) Section 1093.5 thus does not suggest that the parties should request special instructions immediately prior to argument, but rather that they should do so during the time appointed for such discussion.

A court may err by refusing to give an untimely proposed jury instruction despite the requirements of section 1093.5 if its inclusion would not substantially delay proceedings, the proposed instruction is standard and therefore not subject to reasonable controversy, and counsel's tardiness is supported by a reasonable explanation. (*People v. Smith, supra,* 265 Cal.App.2d at p. 779.) Such is not the case here.

The prosecutor and the court had doubts as to whether the instruction proposed by defense counsel properly and completely addressed the issue of fear presented by this case. The defendant concedes that the proposed instruction may have improperly omitted instruction that a defendant who knows, and takes advantage of, a victim's unreasonable fear may be found guilty of robbery. Because the defense requested the instruction only shortly prior to argument, a thorough opportunity for the prosecutor and court to consider the propriety of the proposed instruction would have required a delay of the trial. Defense counsel was aware of possible defenses based on the absence or reasonableness of the victim's fear since Mr. Sabanikh's testimony, three days prior to the scheduled discussion of jury instructions. He had no reasonable explanation for the untimeliness of his request for supplemental instruction. The court's refusal to add the proposed instruction was thus proper pursuant to section 1093.5 and cases interpreting that section.

The instructions given by the court did accurately describe the elements of and relationship between the charged crime of robbery and the lesser included offense of

theft.[11] The jury was told that a union of action and intent was required: the action of taking another's property by means of force or fear against the will of the other with the specific intent to permanently deprive him of the property. Without such union of intent and action the crime was merely theft. This description of the requirements of and distinction between the crimes of robbery and theft prevented a guilty verdict on the charge of robbery without actions by the defendant specifically intended to remove the money from the victim through force or fear. Conviction of robbery was thus precluded if the jury found defendant inadvertently caused an unreasonable fear by the victim which caused him to relinquish the money. The jury instructions therefore did address the defense theory of the case.

Even had the court instructed the jury in the manner suggested on appeal, this instruction would not have provided a defense in this case. Appellate counsel, conceding weakness in the instruction requested by trial counsel, suggests that the court should have crafted an instruction pursuant to *People v. Iniguez* (1994) 7 Cal.4th 847, 856-857, a sexual assault case. This instruction would have explained that "the 'fear' element of the crime of robbery requires proof that the conduct of the defendant caused the victim to incur *actual* fear of injury to himself . . . , and that such fear is either that which a reasonable person would suffer under the same circumstances, or if the fear is not reasonable, that the defendant 'knew of the victim's subjective fear and took advantage of it.' " A defendant's taking advantage of a victim's fear in order to unlawfully take or keep the victim's possessions has indeed been used to supply the "fear" element of robbery where the defendant's own actions did not create the fearful situation. (*People v. Flynn* (2000) 77 Cal.App.4th 766, 771-773.)

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[11] The defendant does not claim that the instructions issued were erroneous, but rather that they did not address his defense that the victim's fear was unreasonable.

As argued by trial counsel, the defendant's whole defense was that he knew that the victim was afraid of him because of his recent experience being robbed, and upon seeing this fear and the opportunity to get some cash, decided to take the money from the cash register manned by the victim. The defendant's own account of his conduct was a perfect example of a perpetrator who knew that his victim harbored fear of being robbed and took advantage of the opportunity to profit from that fear. The absence of such instruction could therefore not have prejudiced the defendant, but rather would likely have solidified his guilt in the eyes of the jury. The court's refusal to issue a jury instruction on this aspect of the law did not prejudice the defendant's case.

## II. *The Court's Denial of the Motion to Sanitize The Defendant's Priors Is Not Subject to Review and Was Nonetheless Proper on the Merits*

The defendant claims the trial court's denial of his request to sanitize his six prior robberies so that they would be disclosed to the jury only as "theft" crimes prejudiced his case because it caused him not to testify. Although such a claim is not ordinarily cognizable when the defendant has refrained from testifying, he claims the defendant's testimony during his *Romero*[12] hearing satisfied the need for actual testimony from which to determine the level of prejudice accruing due to the revelation of the unsanitized priors. We find that the defendant's testimony during his *Romero* hearing did not satisfy the need for trial testimony; the claim is thus barred on appeal. Beyond this, the court did not err by refusing to sanitize the prior convictions.

**Facts**

The defendant moved to sanitize the description of his six prior robberies for the purpose of impeachment should the defendant testify. He argued that allowing use of unsanitized priors for impeachment would essentially cause him to refrain from testifying. The court denied the motion, finding that theft offenses are highly probative

[12] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

of a witness' veracity. The fact that the prior offenses were not violent, unlike those priors sanitized in cases cited by the defendant, showed that any prejudice would not outweigh the probative value of the prior offenses.

The defendant did not testify during the jury trial, but did testify at his *Romero* hearing. His testimony was unclear and inconsistent about his intentions on the date of the robbery. The defendant explained that he had just been kicked out of his fiance's home and felt "desperation" about his poor financial circumstances on that particular day. He was going to a court appearance on a drug charge. He had recently stopped taking his psychiatric medications for bipolar and depression problems due to a gap in his health insurance coverage, which resulted in him having hallucinations and grandiose thoughts. He self-medicated with cocaine and alcohol in order to be "up" enough to attend his court appearance. The defendant attended his court appearance and was looking for the bus stop to get home when he came upon the Pizza Hut and decided to get a drink.

He testified that he did not have enough cash on him to get from his home in Oakland to his destination and back again if he purchased a second soda. He was having delusions that somehow he would get the money to get back home. The idea to rob the Pizza Hut, however, only arose after the victim told the defendant about his previous robbery experience. The defendant thought of grabbing some money from the register and asked Mr. Sabanikh if he was there alone. The defendant noticed that there was a Foot Locker nearby, decided to try to steal something, and threw his soda away before entering the store. The defendant stole a hat from the Foot Locker for a disguise in hopes that the victim would not recognize him when he returned. He testified on cross-examination, however, that he went to the Foot Locker just to shoplift some merchandise, and that he had not yet thought of robbing the Pizza Hut.

The defendant later testified that he did intend to steal from the cash register at the Pizza Hut when he returned the second time. When the victim recognized him the defendant became indecisive about whether to just leave or try to steal the money, which

is why the defendant only gave the victim $1 for the $1.50 soda. What Mr. Sabanikh thought was a gesture of holding or simulating holding a gun at his waistband was just the defendant's attempt to find the extra 50 cents needed to pay for the second soda. He testified he asked Mr. Sabanikh to go to the back of the restaurant so he could steal the money and make his getaway.

The trial court found the defendant's claim that he did not plan to rob Mr. Sabanikh to be not credible, finding that he used the hat and sunglasses in order to disguise himself. The court subsequently denied the defendant's *Romero* motion.

**Discussion**

A defendant may not appeal the trial court's denial of a motion to exclude evidence of prior crimes for impeachment purposes if he refrains from testifying at trial. (*Luce v. United States* (1984) 469 U.S. 38, 42-43; *People v. Collins* (1986) 42 Cal.3d 378, 383.) Without knowing the content of the defendant's testimony the appellate court is unable to weigh the probative value of the impeachment evidence against its prejudicial effect on the defendant's testimony. (*Luce v. United States*, *supra*, 469 U.S. at p. 41; *People v. Collins*, *supra*, 42 Cal.3d at p. 384.) A proffer of the defendant's rendition of the relevant events does not provide an adequate substitute for actual testimony because this account may vary drastically in content or credibility from that to which he would have testified. (*Luce v. United States*, *supra*, 469 U.S. at p. 41, fn. 5.)

The fact that the defendant testified at his *Romero* hearing does not in this case dissolve the *Luce* bar on review of such claims where the defendant refrains from testifying. He argues that the content of what he would have testified at trial is before this court in the form of his *Romero* hearing testimony, eliminating the speculation regarding the content of hypothetical testimony scorned by *Luce*.[13] Appellate counsel

[13] In favor of this argument the defendant cites *People v. Ayala* (2000) 23 Cal.4th 225, 271-273, in which the defense decided not to call as a witness Savacchio due to the court's decision to permit impeachment of his testimony with his admitted instances of

ignores, however, that the defendant's *Romero* testimony did in fact differ from trial counsel's proffered account of the robbery. Trial counsel argued in closing argument that the defendant did not do anything to cause the victim to believe he was being robbed, and only took the money when Mr. Sabanikh urged the defendant to do so. The defendant's *Romero* testimony was offered only after he had been found guilty of robbery. While equivocal in part, the defendant admitted hatching a plan to rob the victim, obtaining a disguise and directing the victim to the back of the restaurant so he could make his getaway. Thus his *Romero* testimony was not necessarily representative of what he would have said had he testified during his trial. Had he testified similarly, it is difficult to determine what additional prejudice could have accrued to his case after such admissions. The fact that the defendant essentially admitted his guilt during his *Romero* testimony leads us to conclude that this was not the type of testimony contemplated by *Luce*, in that it is not amenable to a prejudice analysis as would be trial testimony that sought to exculpate the defendant.

Even were the defendant's claim not barred by *Luce*, we find the trial court did not err by permitting potential impeachment of the defendant's testimony with his prior robbery convictions. Prior felony convictions involving moral turpitude should ordinarily be admitted to impeach the credibility of witnesses in criminal proceedings.

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dishonesty. Savacchio testified in limine that while in prison he had talked with a prosecution witness, Meza, who said he had given false testimony in the defendant's case in exchange for some form of favorable treatment. (*Id*. at p. 272.) Savacchio also testified that he had served five prison terms, and that during the last term he fabricated a story which he told to prison authorities simply to be moved to a different institution. (*Ibid*.) There, the court reviewed on the merits the defendant's claim that the trial court erred by ruling in limine that Savacchio could be impeached because his in limine testimony on the same subjects about which he would have testified was already in the record. (*Id*. at 273.) Even on those facts, the court described the question of whether the alleged error had been preserved as "close and difficult." (*Ibid*.)

(Cal. Const., art. I, § 28, subds. (d),[14] (f)[15]; Evid. Code, § 788[16]; *People v. Castro* (1985) 38 Cal.3d 301, 306, 314.) A trial court may, within its discretion, sanitize the descriptions of prior convictions where evidence of unsanitized prior convictions would be more prejudicial to the defendant's case than probative of his credibility as a witness. (Evid. Code, § 352; *People v. Castro*, *supra*, 38 Cal.3d 301, 305-306.) The defendant concedes, however, that he could offer this court "no reported case [that] has specifically found trial court error for refusing a defendant's request to sanitize a prior . . . ."

While priors that are dissimilar to the substantive charge tend to be less prejudicial than priors that are identical to the current case, the fact that the defendant's priors were theft crimes increases their probative value. (*People v. Rist* (1976) 16 Cal.3d 211, 219, superceded by statute on other grounds as stated in *People v. Collins* (1986) 42 Cal.3d 378, 393; *People v. Gurule* (2002) 28 Cal.4th 557, 607-608.) As observed by the trial court, theft related crimes are among the most probative of a witness' credibility. (*People v. Rist*, *supra*, 16 Cal.3d at p. 219; *People v. Gurule*, *supra*, 28 Cal.4th at pp. 607-608; *People v. Lewis* (1987) 191 Cal.App.3d 1288, 1297.) The defendant was out of prison for seven years and had not accrued any further criminal convictions during that time.[17] The

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[14] "[R]elevant evidence shall not be excluded from any criminal proceeding." (Cal. Const., art. I, § 28, subd. (d).)

[15] "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding." (Cal. Const., art. I, § 28, subd. (f).)

[16] "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony . . . ." (Evid. Code, § 788.)

[17] On the date of the instant robbery the defendant was out of custody for a drug offense that was in a deferred entry of judgment status pending his participation in a drug treatment program. At the sentencing on the instant case the court dismissed the drug offense case.

absence of a continuous record of criminality and the fact that the defendant's prior convictions did not include violent behavior support the court's conclusion that the priors would have been used by a jury for their admissible impeachment value rather than to prejudicially paint the defendant as an inherently evil person. (See *People v. Gurule*, *supra*, 28 Cal.4th at p. 608; *People v. Beagle* (1972) 6 Cal.3d 441, 453 [that defendant's prior conviction was " 'followed by a legally blameless life' " lessens any prejudicial effect of prior convictions], superceded by constitutional amendment on other grounds as stated in *People v. Castro* (1985) 38 Cal.3d 302.) The trial court thus did not abuse its discretion in refusing to sanitize the defendant's prior convictions. (See *People v. Clair* (1992) 2 Cal.4th 629, 655.)

## III. *The Defendant was not Denied a Right to Jury Determination Whether Washington Priors Constituted Strikes*

The defendant claimed at trial and again claims here that the question of whether the defendant's acts during the Washington robberies constituted California strikes and a serious felony should have been submitted to the jury for a finding that the strike criteria were satisfied beyond a reasonable doubt. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).) Because the elements of a Washington robbery do not satisfy the elements of a California robbery, he argues, the trial court's determination that the facts of the defendant's prior convictions could constitute strikes necessarily included factual findings.

We find that the difference asserted by the defendant between the elements of Washington and California robbery convictions does not in fact exist. Because the elements of a Washington robbery satisfy those of a California robbery, no factual analysis was or is required to determine that the defendant's priors constituted strikes and a serious felony. Where, as here, the determination of whether a foreign prior constitutes a California strike requires only legal and not factual analysis, this determination is properly left in the hands of the court.

**Facts**

Included in the record of the defendant's Washington robbery convictions is a written confession stating in part "In Pierce County[,] Washington[,] I demanded money by threats of force, and received money from [unreadable name] employee of South Tacoma Shell Station, on May 27, 1989, from [name], employee of Circle K Store, on Oct. 15[,] 1989, from [name], employee of Am, Pm [*sic*] Store on Oct 17, 1989, from [name], on Sept, 21 1989 and from Michelle Johnson on Sept 23[,] 1989, employees of Circle K Store from Amy Bland, employee of 7-11 Store on Oct 22[,] 1989, from Eugene Jackson, employee of [name] Station on Oct 29, 1989." After a hearing on the defendant's motion to dismiss the court ruled that the elements of a Washington robbery and the facts included in the defendant's record of convictions supported a finding that his priors satisfied the elements of the alleged enhancements. Defendant concedes that there is substantial evidence to support the conclusion that the record of defendant's Washington robberies satisfied the elements of a California robbery.

The defendant moved in limine to dismiss the prior conviction allegations on the grounds that the six Washington robberies did not qualify as strikes and a serious felony under California law. Specifically, he argued that a Washington robbery did not require an intent to permanently deprive the victim of the property. The court found pursuant to *People v. Riel* (2000) 22 Cal.4th 1153, 1206, that a Washington robbery could satisfy the intent to deprive element of a California robbery where the facts of the case supported such a conclusion.[18] The trial court also found, based upon a comparison of the necessary elements of a robbery in each state and the particular facts adduced from the

[18] The defendant does not repeat this argument on appeal, admitting that the Washington robbery statute was construed by that state's courts to include the intent to steal. (*People v. Avery* (2002) 27 Cal.4th 49, 53-56; *State v. Kjorsvik* (1991) 117 Wash.2d 93, 98.)

record of the defendant's convictions, that the Washington robberies could satisfy the allegations in the instant case and therefore denied the motion to strike the allegations.

The defendant claims here that his priors do not constitute strikes because while a California robbery requires that the item must be taken from the actual or constructive possession of the victim, a Washington robbery allows conviction where the property is taken from the mere presence of the victim without any requirement of possession by the victim. He argues that under Washington law, as to each of his robberies, he could have been convicted of taking the money from the presence of a store employee who did not have actual or constructive possession of the money, such as a stock person or visiting administrator. To the contrary, respondent argues that under Washington law, an employee has a responsibility to prevent the loss of property. (*State v. Blewitt* (1984) 37 Wash.App. 397, 399.) This responsibility is akin to constructive possession of the property because though each item in the store may not be in the employee's physical possession, a robbery occurs when business possessions are taken from the employee's care. (*Ibid.*; *State v. Latham* (1983) 35 Wash.App. 862, 864-865, citing 67 Am.Jur.2d (1973) Robbery, § 14, pp. 38-39.)

**Discussion**

A foreign prior conviction qualifies as a "strike" under the California "Three Strikes" law or a serious felony for the purpose of sentence enhancement if it constituted an offense which, if committed in California, would have been punishable as a felony, and which includes all of the elements of a serious or violent felony under California law. (*People v. Myers* (1993) 5 Cal.4th 1193, 1201-1202; *People v. Mumm* (2002) 98 Cal.App.4th 812, 816; *People v. Avery, supra,* 27 Cal.App.4th at p. 53.) The legal elements of the foreign offense as well as any admissible evidence from the record of the prior conviction may be examined to determine whether the elements of a California strike were satisfied by that prior conviction. (*People v. Avery*, *supra*, 27 Cal.App.4th at p. 53; *People v. Woodell* (1998) 17 Cal.4th 448, 452-453.)

A criminal defendant has the constitutional right to a jury determination whether he is guilty beyond a reasonable doubt of every element of the crime with which he is charged. (*United States v. Gaudin* (1995) 515 U.S. 506, 510; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) Likewise, "the question of whether or not the defendant has suffered [a prior conviction for sentence enhancement purposes] shall be tried by the jury . . . or by the court if a jury is waived." (§ 1025, subd. (b); see also § 1158.) The court determines whether the defendant is the same person who suffered the prior convictions. (§ 1025, subd. (c).) In *People v. Kelii* (1999) 21 Cal.4th 452, 454-455, the California Supreme Court upheld the practice that once a jury found that a defendant suffered a prior conviction the trial court was to decide whether that conviction qualified as a serious felony or strike. The United States Supreme Court's decision in *Apprendi, supra,* 530 U.S. at p. 490 stating that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" led to questions of whether such a determination by the trial court rather than the jury violated a defendant's right to a jury trial on any facts increasing his sentence. (*People v. Epps* (2001) 25 Cal.4th 19, 28.)

A fact of a prior conviction is distinct from other facts that may be used to enhance a sentence because a defendant may only accrue a conviction through procedures that necessarily include the right to due process and a jury verdict of guilt beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at pp. 490, 496; *Jones v. United States* (1999) 526 U.S. 227, 249.) The legal question of whether a prior conviction on its face constitutes a serious or violent felony thus properly remains within the court's province. (*People v. Epps*, *supra*, 25 Cal.4th at pp. 23-24.) "Apprendi, . . . reaffirms that defendants have no right to a jury trial of 'the fact of a prior conviction' [citation]," where the prior conviction is a serious or violent felony by definition. (*People v. Epps*, *supra*, 25 Cal.4th at p. 28.)

A factual question arises where, for example, it must be determined whether convictions were brought and tried separately or where the elements of a foreign prior conviction are not congruent with the California definition of the strike. (*In re Taylor* (2001) 88 Cal.App.4th 1100, 1107-1108, citing *People v. Kelii*, *supra*, 21 Cal.4th at pp. 456-457.) The situation in which some fact beyond the conviction itself, such as the circumstances of the crime, must be proven implicates *Apprendi's* requirement for a jury verdict beyond a reasonable doubt. (*People v. Epps*, *supra*, 25 Cal.4th at p. 28.) The defendant's claim thus turns on whether the determination that his Washington convictions satisfied the elements of California robbery was simply a question of law, or required factual analysis beyond "the fact of a prior conviction," as such a fact must be determined by a jury. (*Apprendi, supra,* 530 U.S. at p. 490.)

The Three Strikes law defines a strike as, among other things, "[a]ny offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state." (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) Some felonies, such as "murder," "mayhem," "rape," "arson," "robbery," and "kidnapping" are serious felonies by definition. (§ 1192.7, subd. (c).) The definitions of these crimes spring from the elements of each in California rather than from references to the Penal Code of this or any other state. (*People v. Myers* (1993) 5 Cal.4th 1193, 1200.)

If a foreign prior conviction satisfies the California definition of a serious felony in a comparison of the elements at the crimes, this analysis is entirely legal. (*People v. Kelii*, *supra*, 21 Cal.4th at p. 456; *In re Taylor, supra,* 88 Cal.App.4th at pp. 1108-1109.) The court may thus examine the judgment of conviction, the statutory elements which are necessarily proven by the conviction, and applicable case law without stepping from the realm of purely legal analysis and into the jury's fact-finding province. (*In re Taylor*, *supra*, 88 Cal.App.4th at pp.1107-1108.)

For example, in *People v. Martinez* (2003) 31 Cal.4th 673, our state's Supreme Court conducted a post-*Apprendi* analysis of whether the defendant's prior conviction for

murder in Texas constituted a prior murder special circumstance with respect to our death penalty law.[19] There, the jury found true the allegation that the defendant had been convicted of murder, and the trial court and the Court of Appeal made findings as to whether the prior crime satisfied the California elements of first or second-degree murder as a question of law[20] without input from the jury. (*Id*. at pp. 680-689.) The Supreme Court likewise analyzed the contents of the two states' statutes, the language from the defendant's indictment and the fact of his prior guilty plea to determine that the prior conviction satisfied the alleged special circumstance. (*Id*. at pp. 681, 688.) The Court further concluded that such analysis did not impermissibly veer into an examination of the "facts and circumstances" of the conviction. (*Id.* at p. 688.) We may thus properly consider the statutes and case law describing the crime of which the defendant was previously convicted and the California version of that crime as dictated by the applicable statutes and case law without triggering the defendant's constitutional rights to a jury determination of this question.

With regard to the elements of robbery, the defendant analogizes his case to *People v. Nguyen* (2000) 24 Cal.4th 756, in which a one of nine convictions for robbery was reversed because of an erroneous jury instruction which allowed a conviction in the

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[19] The California death penalty pay be imposed if "[t]he defendant was convicted previously of murder in the first or second degree . . . . [A]n offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree." (§ 190.2, subd. (a)(2).) The similarity between this statutory language and related case law and that used in the three strikes law renders the analysis equally applicable here. (See *People v. Andrews* (1989) 49 Cal.3d 200, 222-223 [statutory "intent was to limit the use of foreign convictions to those which include all the elements of the offense of murder in California"].)

[20] The defendant claimed that the absence of express or implied malice as an element of a Texas murder conviction did not foreclose that his acts may have only constituted manslaughter under an imperfect self-defense theory within California law. (*People v. Martinez*, *supra*, 31 Cal.4th at p. 681.)

absence of the element of possession. The jury was improperly instructed that a visitor to the business could serve as the victim of a robbery conviction based upon the defendant's taking of business property without any actual or constructive possession or control of that property by the visitor. He further argues that a Washington robbery requires no need to prove who owned or possessed the property at the time of the robbery, while California law requires proof that the victim had actual or constructive possession of the loot at the time of the robbery. (*State v. Long* (1964) 65 Wash.2d 303, 316.)

The defendant overstates the distinctiveness between California and Washington robbery law.[21] First, the defendant misstates the holding of the Washington case upon which he relies. The court held in *State v. Long, supra,* 65 Wash. 2d at page 316, that the testimony of two motel clerks that the defendants stole money in their possession that belonging to the owners of the establishments was sufficient evidence to establish that the victims possessed the money on behalf of the business owners. (*Ibid*.) Second, California applies the same standard in that the testimony of the custodian of property may suffice to establish the ownership of the property by a third party and its constructive possession by the victim. (*People v. Guareno* (1937) 22 Cal.App.2d 82, 83-84 [maid who was present in home when defendants walked in, demanded money, then took cash hidden in a trash can sufficed to establish its ownership by another and maid's constructive possession for purpose of proving elements of robbery].)

The type of possession required for a robbery conviction in California varies widely with the circumstances of the individual case, as it does in Washington. " ' "Robbery is an offense against the person; thus a store employee may be the victim of a robbery even though he is not its owner and not at the moment in immediate control of the stolen property.' [Citation.] Robbery convictions have been upheld against

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[21] "A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear . . . ." (Wash. Rev. Code § 9A.56.190.)

contentions that janitors and night watchmen did not have a sufficient possessory interest in their employer's personal property to qualify as victims. [Citations.] Even a visitor in a store who was forced to remove and surrendered money from the store's cash box was held to be a victim of the robbery. [Citation.]' [Citations.]" (*People v. Nguyen*, *supra*, 24 Cal.4th at p. 761, quoting *People v. Miller* (1997) 18 Cal.3d 873, 880.)

In fact, California cases have relied upon Washington state law to define the nature of constructive possession of property for the purpose of robbery. (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461, quoting *State v. Latham, supra,* 35 Wash.App. 862, 864-865 ["A person must have an ownership interest in the property taken, or some representative capacity with respect to the owner of the property taken, or actual possession of the property taken, for the taking of the property to constitute a robbery"], disapproved of on other grounds by *People v. Rodriguez* (1999) 20 Cal.4th 1, 13-14.) The case of *People v. Bekele, supra,* 33 Cal.App.4th 1457, was in turn cited by our Supreme Court in *People v. Nguyen* as an example of the application of the principle that the victim must have some type of possession of the property taken during a robbery. (*People v. Nguyen*, *supra*, 24 Cal.4th at p. 762, fn. 2.) Thus, only legal analysis is necessary to show that the defendant's prior convictions constituted California strikes.

Even were the court required to examine the record of the defendant's prior convictions to determine whether the property stolen was in the possession of the victims, the defendant's written confession satisfied the possession element of a California robbery conviction. A court's failure to submit a factual question that exposes the defendant to greater punishment to a jury verdict is reversible unless it is shown beyond a reasonable doubt that the error did not contribute to the defendant's conviction. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) The defendant's confession stated that he "demanded money by threats of force, and received money" from seven different individuals who were listed by name. This choice of words supports the conclusion he did in fact take the money from the possession of these individuals, satisfying this

element of a California robbery. Any error by the court in failing to have a jury make this determination was thus harmless beyond a reasonable doubt.

In sum, contrary to the defendant's claim, a Washington robbery conviction does contain the elements of a California robbery. The trial court's determination that the defendant's prior robbery convictions could constitute strikes and a serious prior felony conviction was purely legal and thus did not invade the jury's fact-finding province within the meaning of *Apprendi*. Any factual findings that may have been necessary for the court to establish the possession element of robbery were amply supported by the defendant's written confession and therefore harmless.

## IV. *The Court Found That the Defendant's Prior Convictions Constituted Strikes*

The defendant claims that because he had the right to a finding beyond a reasonable doubt regarding any fact that increases his punishment, the absence of a finding that the prior robberies constituted strikes and a serious felony conviction in effect entered a finding that the allegations were not true. The findings must therefore be reversed, he argues, and presumably so must the five-year enhancement and 25 year to life sentence arising therefrom. The People argue that the record supports the conclusion that the court's finding was implicit in its application of the Three Strikes Law and the five-year sentencing enhancement. We conclude that the trial judge's finding was implicit in the application of the Three Strikes law.

### Facts

After the hearing on the defendant's motion to dismiss the allegations that the Washington priors constituted strikes and a serious felony, the trial court denied this motion. Specifically, the court stated, "now, he's arguing that these prior offenses in Washington state cannot qualify as California strike priors because the statutory definition of what constitutes a robbery is different between the two states. [¶] With respect to the [claim that a Washington robbery did not include a 'permanently-deprived'

element], I am, in my opinion, bound by the Riel decision, by the California Supreme Court, 22 Cal.4th 1153, 1203 through 1207. [¶] In that case, the court found that both legally and factually, the Washington priors in that case satisfied the strike prior definitions in California with respect to intent to permanently deprive. And based on that decision and what the court said specifically at page 1206, . . . I'm going to make a determination that the intent to permanently deprive was legally present at the time the defendant was convicted, and factually present. [¶] [The defendant's other claim fails.] [¶] Therefore, I'm going to deny the defendant's motion in this matter."

After convicting the defendant of the instant crime, the jury found pursuant to section 1025, subdivision (b)[22] and section 1158[23] that the prior convictions had occurred. At sentencing, the trial court found pursuant to section 1025, subdivision (c)[24] that the defendant was the individual who had suffered the prior Washington convictions. When the parties offered to present evidence and argument regarding whether the defendant's priors fulfilled the strike and serious felony allegations the court responded, "You know, I think the nature of the conviction is not a jury issue. And as a matter of fact, I think we have already dealt with that in the prior proceeding. So I am not going to allow the

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[22] "Except as provided in subdivision (c), the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty . . . ." (§ 1025, subd. (b).)

[23] "Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction. . . . If more than one previous conviction is charged a separate finding must be made as to each." (§ 1158.)

[24] "Notwithstanding the provisions of subdivision (b), the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury." (§ 1025, subd. (c).)

evidence." The court did not, however, make an express finding at sentencing as to whether the allegations qualified as strikes.[25]

**Discussion**

"When no words are used and the trier of fact fails to make a finding [regarding the proof of a prior conviction] the effect is the same as a finding of 'not true.' [Citation.]" (*People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1440, citing *People v. Eppinger* (1895) 109 Cal. 294, 297-298, see also *People v. Mesa* (1975) 14 Cal.3d 466, 471 [" 'Reference to the prior conviction must be included in the pronouncement of judgment for if the record is silent in that regard, in the absence of evidence to the contrary, it may be inferred that the omission was an act of leniency by the trial court. In such circumstances the silence operates as a finding that the prior conviction was not true' "].)

This case is distinct from *Eppinger* and *Mesa* in a key respect. In neither of those cases were any factual findings made regarding the prior convictions, nor were the concomitant sentences imposed at the original sentencing. Thus, in those cases the record was truly devoid of any indication that the prior crime allegations were found true by the time the defendant's were sentenced. We may, however, imply a true finding regarding a sentencing enhancement by the court's express imposition of sentence in accord with that allegation. (*People v. Clair* (1992) 2 Cal.4th 629, 691, fn. 17; *People v. Chambers* (2002) 104 Cal.App.4th 1047, 1050-1051.) In both of *Clair* and *Chambers*, it was ultimately held that the trial court had implicitly rendered a true finding on the enhancement when it imposed a term based upon that enhancement. (*People v. Clair, supra,* 2 Cal.4th at p. 691, fn. 17; *People v. Chambers, supra,* 104 Cal.App.4th at pp. 1050-1051.)

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[25] Respondent concedes that there was no finding that the prior crimes constituted strikes.

Likewise, in the present case we conclude that the trial court implicitly found that the crimes of which the defendant had previously been convicted satisfied the legal requirements of the prior crime allegations. The jury found that the defendant had suffered six prior convictions for robbery. The court found that the defendant was the same person as the individual previously convicted. Thus, contrary to the defendant's argument, there were express findings of fact that the defendant did suffer the alleged prior convictions.

While the trial court did not explicitly state during sentencing that it had found that the prior convictions fulfilled the elements of the allegations, that ruling may be implied from other portions of the record. The record also supports the conclusion that the court determined that the prior robbery convictions satisfied the legal elements of six prior strikes and a serious felony conviction. As discussed earlier in this opinion, the court and the parties engaged in extensive briefing and discussion of whether the defendant's prior convictions satisfied the allegations. At the end of this hearing the court notified the parties that it believed the Washington robberies constituted California strikes both as a matter of law and within the facts of the case. The court also conducted a full hearing regarding whether to strike any priors pursuant to *Romero*.[26] The court explicitly ruled in limine that the Washington priors contained the elements of California strikes. The fact that the trial court sentenced defendant pursuant to the Three Strikes law and applied the five-year prior serious felony enhancement confirm that it did consciously, if not expressly, find at sentencing that the prior allegations had been satisfied.

[26] Under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, a trial court has the authority to strike allegations of prior convictions for purposes of the Three Strikes law.

## V. *The Defendant's Sentence Is Not Cruel or Unusual*

The defendant also claims the 30 years to life sentence he received violated the state and federal constitutional bars on cruel and unusual punishment in that this punishment was disproportionate to the instant crime, his criminal history and the sentence he would have received in other jurisdictions.[27] (See U.S. Const., 8th Amend; Cal.Const., Art I, § 17.)[28] While the defendant's criminal history is not among the worst contemplated by the Three Strikes Law, we do not believe his case falls outside the boundaries established by our hightest courts in similar cases.

The duties of defining crimes and prescribing punishments for such crimes fall primarily upon the state's legislature. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 998-999; *In re Lynch* (1972) 8 Cal.3d 410, 414, superceded by statute on other grounds as stated in *People v. West* (1999) 70 Cal.App.4th 248, 297.) A sentence, however, that is grossly disproportionate to the crime violates federal constitutional bars on cruel and unusual punishment. (*Lockyer v. Andrade* (2003) __ U.S. __, 123 S.Ct. 1166, 1173.) Under the California Constitution, a sentence that "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity" is impermissible as cruel or unusual. (*In re Lynch*, *supra*, 8 Cal.3d 410, 424, fn. omitted; *People v. Dillon* (1983) 34 Cal.3d 441, 478.)

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[27] Respondent argues that the defendant waived any claim that his sentence was cruel and/or unusual by failing to make such an argument at the time of his sentencing. We will address this issue on its merits because if such a claim prevailed here, defense counsel's failure to object to the sentence would have constituted ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694; *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

[28] The Eighth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Article I, section 17, of the California Constitution likewise declares that "cruel or unusual punishment may not be inflicted or excessive fines imposed."

Although the United States Supreme Court recently acknowledged the lack of clear guidance towards the application of the federal standard (*Lockyer v. Andrade*, *supra*, 123 S.Ct. at p. 1173) our highest courts have instructed us to examine the gravity of the offense in comparison to the severity of the penalty, sentences imposed on other criminals in the same jurisdiction and those imposed in other jurisdictions for the same type of crime. (*Solem v. Helm* (1983) 463 U.S. 277, 290-292; see also *Lockyer v. Andrade*, *supra*, 123 S.Ct. at pp. 1173-1174 [applying *Solem*]; *In re Lynch, supra* 8 Cal.3d at pp. 425-427; *People v. Dillon, supra,* 34 Cal.3d at pp. 477-478 [reaffirming that the *In re Lynch* factors governed cruel and unusual analysis].) With respect to the California standard, a punishment that is not cruel or unusual in concept may violate our constitution if its application is disproportionate to the defendant's past and present culpability. (*People v. Dillon*, *supra*, 34 Cal.3d at pp. 479, 482-489.)

The defendant claims that his robbery was not as serious as other robberies because but for the victim's " 'eggshell skull' " "there would not have been anything more taking place at the pizza restaurant than two sales of soda pop" to the defendant. Appellate counsel forgets that the defendant was convicted of intentionally using threats of force to persuade Mr. Sabanikh to hand over the contents of the cash register. Crediting the victim's testimony,[29] the defendant said that he would not or did not want to shoot Mr. Sabanikh. While this was not an explicit threat, it was an implicit warning that violence was a possibility. The threat of violence is what escalates a robbery beyond the scope of mere larceny into an assaultive crime. (*People v. Bonner* (2000) 80 Cal.App.4th 759, 763.) Such acts are not only psychologically traumatizing to the victims but may cause injury or death should a victim choose to try to defend himself. As to the defendant's past history, he had engaged in similar acts on six prior occasions.

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[29] On appeal, we must review the evidence in the light most favorable to the judgment. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.)

The defendant "was punished not just for his current offense but for his recidivism. Recidivism justifies the imposition of longer sentences for subsequent offenses. [Citation.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 825.) In *Rummell v. Estelle* (1980) 445 U.S. 263. 284-285, the United States Supreme Court reasoned that society is warranted in imposing increasingly severe penalties on those who repeatedly commit felonies. (*In re Lynch*, *supra*, 8 Cal.3d at p. 424.) In that regard, we note that California's Three Strikes law treats all third offenders with two prior "strike" convictions the same way (see *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1512) and that, historically, habitual offender statutes, including the Three Strikes statute, have withstood cruel and unusual challenges. (See, e.g*., In re Rosencrantz* (1928) 205 Cal. 534, 539; *People v. Weaver* (1984) 161 Cal.App.3d 119, 126; *People v. Gray* (1998) 66 Cal.App.4th 973, 992-993; *People v. Martinez, supra*, 71 Cal.App.4th at pp. 1511-1512, 1517.) The fact that California's recidivist scheme is among the harshest in the nation does not require us to conclude that it is unconstitutionally cruel or unusual as applied to the defendant. (*People v. Martinez, supra,* 71 Cal.App.4th at p. 1516; *People v. Cooper, supra,* 43 Cal.App.4th at p. 827.)

Although we may certainly conceive of more serious crimes and criminal records than the defendant's, his actions do fall within the bounds of the Three Strikes Law, which has been upheld in similar situations. The defendant has not presented us with compelling evidence that he should not be held culpable for his crimes.

**DISPOSITION**

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

WUNDERLICH, J.

MIHARA, J.